IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2009 Session

CYDNIE BROWNING O'ROURKE v. JAMES PATRICK O'ROURKE

Direct Appeal from the Chancery Court for Williamson County
No. 27493 R.E. Lee Davies, Chancellor

No. M2007-02485-COA-R3-CV - Filed June 5, 2009

HOLLY M. KIRBY, J., DISSENTING:

I must respectfully dissent in part from the majority opinion in this case. I dissent from the majority's affirmance of the trial court's finding of criminal contempt; in all other respects, I concur.

It is clear that, in the long and tortured course of the ongoing dispute between the parties, Mrs. O'Rourke consistently engaged in actions which drew the ire of the trial judge, forced him to issue orders with strict boundaries for her parenting responsibilities, and resulted in repeated warnings to her to abide by the court's orders. However, I believe that the record does not support a finding that Mrs. O'Rourke's failure to notify Mr. O'Rourke of the trip and her decision to bring the children to school late amounted to criminal contempt.

On the notification issue, the majority rightly points out that the amended parenting plan clearly states that Mrs. O'Rourke was to provide Mr. O'Rourke with an itinerary and contact information if she took the children out of town "overnight." The amended order was more restrictive than the more usual 48-hour period that is provided in the applicable statute. Without question Mrs. O'Rourke was responsible for reading and understanding the terms of the amended order.

Mrs. O'Rourke maintained at trial that she was not aware that the amended order had shortened the period triggering her obligation to notify Mr. O'Rourke of the children's travel itinerary, and that she called her new attorney to ask if she was obliged to notify Mr. O'Rourke that she was taking the children to visit their grown sister, Shawn Sanders, in Colorado. Mrs. O'Rourke testified that her attorney at that time advised her that notification was not required unless the children would be out of town for 48 hours or more. The proof indicated that Mrs. O'Rourke purposefully shortened the trip to see Shawn Sanders so that the time period in which the children would be out of town would be less than 48 hours, in order to avoid having to notify Mr. O'Rourke of the trip. Apparently Mrs. O'Rourke's attorney generally corroborated her testimony.

The trial judge could have disbelieved Mrs. O'Rourke's testimony and found that she was aware of the notification requirement in the amended order and chose to disregard it. However, the trial judge's statements at the conclusion of the contempt hearing indicate that he accepted Mrs. O'Rourke's testimony but nevertheless found her to be in contempt. He stated:

> . . . [I]t's undisputed Mrs. O'Rourke failed to provide any notice whatsoever that she was leaving Nashville overnight on September 22, and her reason for not doing so is because she didn't think that was what the agreement said – not the agreement – the order.
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> I find that that is not a justifiable excuse that would keep her out of willful contempt of court. Not reading the order is not an excuse.
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> More than that, I find it was intentional that she actually was trying to get by the spirit of the order because she thought it was 48 hours. So what she was trying to do was set up a trip, she'd go out of town and get back in time so she wouldn't have to comply with what she thought were the requirements. I find that was intentional.

Thus, the trial judge stated that it was "undisputed" that Mrs. O'Rourke did not think that notice was required for a trip of less than 48 hours, but he nevertheless found her conduct willful because (a) she was required to read and understand the order and (b) she was trying to "get by the spirit" of the order. The question then becomes, if Mrs. O'Rourke was in fact under the mistaken impression, from her attorney, that the order required her to notify Mr. O'Rourke only if the trip were more than 48 hours, is this the type of intent required to find that she willfully violated the court's order and was in criminal contempt of court?

Some older Tennessee cases indicate that constructive knowledge of the terms of the trial court's order may be sufficient to support a finding of criminal contempt. In ***Garrett v. Forest Lawn Memorial Gardens, Inc.***, 588 S.W.2d 309, 315 (Tenn. Ct. App. 1979), the Court stated: " In neither a civil nor criminal contempt case is the defense of acting under the advice of counsel sufficient to prevent a finding that defendant is guilty of contempt. Rather, acting in good faith upon the advice of counsel is a mitigating factor considered in determining the appropriate punishment." (Citing ***Robinson v. Air Draulics Engineering Co.***, 377 S.W.2d 908 (Tenn. 1964)).

However, the applicability of these cases to the issue here is questionable because they appear to group together both civil and criminal contempt. ***Id.*** Moreover, since the date on which the above cases were decided, Tennessee caselaw on criminal contempt has evolved considerably. ***See, e.g.***, ***Ahern v. Ahern***, 15 S.W.3d 73 (Tenn. 2000); ***State v. Wood***, 91 S.W.3d 769 (Tenn. Ct. App. 2002); ***Storey v. Storey***, 835 S.W.2d 593 (Tenn. Ct. App. 1992).

While recent Tennessee cases have addressed other aspects of criminal contempt, they have not addressed the issue presented here. Clearly the alleged contemptuous act must be a willful or intentional act. ***Ahern***, 15 S.W.3d at 78. The elements of criminal contempt must be proven beyond

a reasonable doubt. ***State v. Wood***, 91 S.W.3d at 773. "Willful" means that the violation of the court's order "was committed intentionally, with knowledge that the act was in violation of the court order, as distinguished from an accidental, inadvertent or negligent violation of an order." 17 C.J.S. *Contempt* § 14. ***See, e.g., Hector v. United States***, 883 A.2d 129, 132 (D.C. Ct. App. 2005) (finding of criminal contempt reversed because no proof that alleged contemnor was aware of all of the terms of the order, so evidence insufficient to find beyond a reasonable doubt that he willfully violated order).

Thus, an attempt to "get by the spirit" of a court order is not sufficient for a finding of criminal contempt. If the alleged contemnor in fact did not have knowledge of the terms of the order that was violated, I believe that this precludes a finding that her violation of the order was willful. In this case, the trial court's holding was premised on its conclusion that Mrs. O'Rourke believed, after consulting with her attorney at the time, that the order did not require her to notify Mr. O'Rourke of the trip. In light of this, I believe that the intent element has not been satisfied, and I would reverse the finding of criminal contempt on that basis.

The trial court also found that Mrs. O'Rourke was in criminal contempt for getting the children to school late on the Monday following the trip at issue. Because Mrs. O'Rourke and the children did not arrive home from the trip until quite late Sunday night, Mrs O'Rourke allowed the parties' son to sleep late and brought him to school an hour late on Monday morning, causing him to miss his 1st period P.E. class. The parties' daughter also arrived at school a few minutes late that same Monday morning. The trial court held Mrs. O'Rourke in criminal contempt for getting both children to school late. The majority affirms that finding as well.

The provision in the parenting plan that Mrs. O'Rouke allegedly violated states that Mrs. O'Rourke "shall have responsibility from Thursday when school is dismissed to Monday when school resumes." Mr. O'Rourke asserted that Mrs. O'Rourke violated this by choosing to bring their son to school late, and the trial court agreed. In his oral findings after the hearing, the trial court stated:

> I turn to the next count of not bringing them back to school. You know, there are going to be lots of occasions where some parent might be delayed bringing the child back to school, and that's just not – I'm not going to find those things to be intentional or willful violations of the court order. Things happen.
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> But in this case, Mrs. O'Rourke made a calculated and intentional act to book this flight, knowing that she was going to come back after midnight on a school night. And on top of that, she was taking the children to visit the one person that I have severe misgivings about, Shawn Sanders, that I can tell in this case. Only bad things seem to happen.

> And so she made an intentional decision to get those children back late. That intentional decision resulted in the failure to have Caroline at school on time, and then she made an intentional decision not to have Sammy there.
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> So it was more important for her to have her children go out for the weekend to Colorado to visit Shawn Sanders than to have them rested and ready for the school day. That's what I get out of it. I find that to be a willful violation of the Court's order.

I cannot agree that Mrs. O'Rourke's choice to let her son sleep late and bring him to school an hour late amounts to a willful violation of the trial court's order stating that Mrs. O'Rourke's parenting responsibilities end on "Monday when school resumes." There is no indication in the record that the trial court held Mrs. O'Rourke in criminal contempt because she had a history of tardiness in bringing the children to school. Rather, the trial court's stated reasons were (a) Mrs. O'Rourke's original decision to take the children on the trip, for which she had already been found in criminal contempt, and (b) the reason for the trip, i.e, to see the children's sister, Shawn Sanders. While the record indicates that the trial judge believed Ms. Sanders to be an adverse influence on the children, the parenting plan does not prohibit either parent from bringing the children to see Ms. Sanders. In addition, the parenting plan gives each parent the right to make day-to-day decisions on the children's care during that parent's residential parenting time. The court should not find criminal contempt "unless the order violated is clear and explicit and the act complained of is clearly proscribed." 17 C.J.S. *Contempt* § 14. Here, I believe that it is unreasonable to expect Mrs. O'Rourke to know that bringing her son to school an hour late would constitute a willful violation of the parenting plan provision stating that her parenting responsibilities end on "Monday when school resumes." While the wisdom of Mrs. O'Rourke's decision to bring the children to school late can be debated, I cannot agree to affirm a holding that it rose to the level of criminal contempt of court.

For these reasons, I respectfully dissent from the majority's decision to affirm the trial court's finding that Mrs. O'Rourke was in contempt of court. In all other respects, I concur in the majority opinion.

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HOLLY M. KIRBY, JUDGE